

Before the
Federal Communications Commission
Washington, D.C. 20554

MM-Docket No. 92-97

In re Applications of

JOY PUBLIC
BROADCASTING CORP.
(hereafter "Joy")

File No. BPED-900621MA

COMMUNITY FAMILY
BROADCASTING, INC.
(hereafter "Community")

File No. BPED-910319MA

For Construction Permit for a New
Noncommercial Educational FM Station
on Channel 203A at Lincoln, Nebraska

HEARING DESIGNATION ORDER

Adopted: April 23, 1992;

Released: May 5, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.

2. *Share-time Arrangement.* The applicants have indicated they have not been able to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

3. *U.S.-Mexican Agreement.* Joy certified in its application (Section V-B, Item 16) that its proposed antenna location is within 320 kilometers (km) of the Mexican border, but also indicated, apparently inconsistently, that a showing of compliance with the provisions of the governing bilateral U.S.-Mexican Agreement is "not applicable." However, we take official notice that Joy's antenna location is considerably greater than 320 km from the Mexican border. Therefore, Joy is correct that it need not specifically show compliance with the Agreement. Nevertheless, Joy will be required to submit an amendment to correct its certification.

4. *Ownership and Control.* Section II, Item 7 of Joy's application (FCC Form 340 (May 1985)) asks the applicant:

Do documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that (a) voting rights will remain with the applicant, even in the event of default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. § 310(d)) will be obtained?

If No, attach [an explanatory exhibit].

Joy responded by checking "No" to the question but asserted that the need to supply an explanatory exhibit was "not applicable." Therefore, Joy will be required to provide the omitted exhibit at hearing. If there are no such "documents, instruments, agreements or understandings," it should affirmatively so state in the exhibit.

5. *TV 6 Interference.* On March 19, 1991 The Chronicle Publishing Company ("Chronicle"), licensee of Channel 6 television station WOWT, Omaha, Nebraska, filed a petition to deny against Joy's application. The petition alleges that Joy's proposed operation would create interference to WOWT affecting more than 3,000 persons, in violation of 47 CFR § 73.525. As a result, it concludes, numerous viewers in Lincoln, NE would be deprived of their only NBC network service.

6. Chronicle does not fault Joy's analysis of predicted Channel 6 interference, which determined that 2,623 persons would be affected, in compliance with the 3,000 person limit in 47 CFR § 73.525. Instead, Chronicle argues that the use of a vertically polarized antenna, when mounted on the proposed tower structure, will result in distortion of the omnidirectional antenna pattern thus causing the proposed station to radiate in excess of the specified 5.0 kW effective radiated power in some directions. As a result, interference could easily affect residents within the city boundaries of Lincoln, NE. Should such interference occur, Chronicle notes that Joy's proposal would no longer be in compliance with 47 CFR § 73.525. Consequently, Chronicle urges the Commission to not grant Joy's application pending the submission of additional information from Joy to demonstrate conclusively that the actual antenna radiation pattern from its proposed antenna and tower configuration will comport with its application. Alternatively, Chronicle seeks the imposition of a condition on Joy requiring antenna pattern measurements prior to the commencement of program test operations, should Joy's construction permit be granted.

7. In response, on April 17, 1991 Joy filed its response to Chronicle's petition to deny. In that pleading, Joy indicated that radiation pattern measurements for its proposed vertically polarized antenna would be conducted utilizing a tower that duplicates the proposed tower structure. Joy agreed to accept a condition on its construction permit requiring antenna pattern measurements and agreed to retain a licensed surveyor to insure that the installation is properly made. Accordingly, the following condition will be placed on Joy's construction permit, if granted as a result of this proceeding:

The automatic program test provisions of 47 CFR § 73.1620 do not apply in this case. A formal request for program test authority must be filed in conjunction with FCC Form 302, application for license, before program tests will be authorized. This request should be made at least 10 days prior to the date on which program tests are desired to commence. This request must contain documentation which demonstrates compliance with the following conditions:

1. The permittee shall submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components. This proof-of-performance may be accomplished using the complete full size antenna, or individual bays therefrom, mounted on a supporting structure of identical dimensions and configuration as the proposed structure, including all braces, ladders, conduits, coaxial lines, and other appurtenances; or using a carefully manufactured scale model of the entire antenna, or individual bays therefrom, mounted on an equally scaled model of the proposed supporting structure, including all appurtenances. Engineering exhibits should include a description of the antenna testing facilities, including appropriate photographs and sketches and a description of the antenna testing procedures, including scale factor, measurements frequency, and equipment calibration.

2. The permittee shall submit an affidavit from a licensed surveyor to establish that the antenna has been oriented at the proper azimuth.

3. The relative field strength of the measured vertically polarized component shall not exceed 1.0 on the authorized omnidirectional antenna radiation pattern, where a relative field strength of 1.0 corresponds to 5.0 kW effective radiated power.

8. *Late-Filed Amendments.* Joy twice petitioned for leave to amend its application on October 21, 1991. The accompanying amendments were filed after September 30, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; (b) the extent to which each of

the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcasting service.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Joy shall submit the clarifying amendment and the explanatory exhibit, as specified in paragraphs 3 and 4 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the petition to deny filed by Chronicle IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

13. IT IS FURTHER ORDERED, That the two petitions for leave to amend filed by Joy ARE GRANTED and the corresponding October 21, 1991 amendments ARE ACCEPTED to the extent indicated in paragraph 8 above.

14. IT IS FURTHER ORDERED, That in the event of grant of Joy's construction permit, it shall contain the condition set forth in paragraph 7, above.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau